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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DIANE DOE, BY ROBERT DOE AND NAOMI DOE, HER PARENTS AND NEXT FRIENDS,

Petitioner,

vs.

OMER RENFROW, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS OF THE HIGHLAND COMMUNITY SCHOOL CORPORATION; GEORGE KURTEFF, INDIVIDUALLY AND AS PRINCIPAL OF HIGHLAND SENIOR HIGH SCHOOL; HARVEY KEIM, INDIVIDUALLY AND AS PRINCIPAL OF HIGHLAND JUNIOR HIGH SCHOOL; JOHN GUIDEN, LORRAINE KING, LAWRENCE VASSER, BURTON MASEPOHL, AND JOHN TERPSTRA, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE HIGHLAND COMMUNITY SCHOOL CORPORATION; NOEL HALL, AS A MEMBER OF THE BOARD OF TRUSTEES OF THE HIGHLAND COMMUNITY SCHOOL CORPORATION; AL PRENDERGAST, INDIVIDUALLY, AS CHIEF OF POLICE OF HIGHLAND, INDIANA, AND AS A MEMBER OF THE BOARD OF TRUSTEES OF THE HIGHLAND COMMUNITY SCHOOL CORPORATION; JAMES TUROCI, AS CHIEF OF POLICE OF HIGHLAND, INDIANA; and PATRICIA LITTLE, INDIVIDUALLY AND AS DEPUTY SHERIFF OF MIAMI COUNTY, INDIANA;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the joint conduct of police and school authorities, in detaining the entire student population of a public school, and in exposing each child in the school to an individual search of his person and immediate belongings by a police dog, to interrogation by police officers, to the search of pockets and purses, and to strip-searches, constitute invalid searches and seizures prohibited by the Fourth Amendment to the United States Constitution?

2. Where police and school authorities undertake such joint conduct without warrants, without particular facts giving rise to any suspicion concerning any specific child, and without limitation to children suspected of wrongdoing, should declaratory and injunctive relief be accorded to the class of children affected?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Diane Doe, by Robert Doe and Naomi Doe, her parents and next friends, respectfully prays that a writ of certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana is reported at 475 F. Supp. 1012 (N. D. Ind. 1979). The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 631 F. 2d 91 (7th Cir. 1980). Opinions of four judges of the court of appeals dissenting from the denial of rehearing are also reported at 631 F. 2d 91, 93-95 (7th Cir. 1980). All opinions are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1980. The timely application of appellees below, Respondents here, for rehearing was denied on August 1, 1980. The timely application of appellant below, Petitioner here, for rehearing, and her suggestion for rehearing *en banc,* were denied by an evenly-divided Seventh Circuit on November 3, 1980. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 2(3) of the Civil Rights Act of 1871, 42 U. S. C. § 1985(3), provides, in pertinent part, as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Rule 23 of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

STATEMENT OF THE CASE

Petitioner is a thirteen-year-old girl enrolled as a student at Highland Junior High School in Highland, Indiana. Respondents are the superintendent, board of trustees, high school principal, and junior high school principal of the Highland Community School Corporation; the chief of the Highland Police;[1] and a Miami County, Indiana, deputy sheriff.

The conduct at issue in this case consisted of a shakedown, dragnet inspection of the persons of all students present at the Highland senior and junior high schools on March 23, 1979. The purpose of the warrantless search was "to see if there were any drugs present" in the Highland schools and, if so, to punish those who possessed them and to deter others from bringing them in. (Tr. 104).[2]

The search process was carried on jointly by Highland police and school officials. It began with the mass detention of every child in the two schools and on the campus which surrounds them. Detention was followed by the subjection of every student, individually, to the scrutiny of trained police dogs. The dogs and their handlers, consisting of non-police

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[1] At the time of the Highland schoolhouse raid, and at the time of the evidentiary hearing below, Al Prendergast was chief of the Highland police and James Turoci was a lieutenant of the Highland police in charge of the youth division. Mr. Prendergast has since retired from the police department, and has been succeeded in office by Mr. Turoci. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Mr. Turoci has been joined as a Respondent to this petition. John Guiden and Lorraine King have left the Highland school board since the raid, and have been succeeded in office by Noel Hall, now also joined under F.R. Civ. Pro. Rule 25(d)(1), and by Mr. Prendergast, now joined additionally in his new official capacity.

[2] An evidentiary hearing, variously characterized by the district court as a "hearing on a preliminary injunction" and as a "trial on the merits," was held, without a jury, on June 7, 1979. References to pages of the transcript of that hearing are signaled by "Tr."

personnel and off-duty police officers all from outside the Highland community, were supplied and led by Respondent Patricia Little. She is a deputy sheriff of the Sheriff's Department of Miami County, Indiana, and the owner of the Edelheim Police Canine Academy of Bunker Hill, Indiana.[3]

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[3] Mrs. Little is engaged in the business of training police dogs for the purposes of attack, tracking, and detecting marijuana. (Tr. 277). She provides, upon request, dogs and personnel for the conduct of drug searches in schools (Tr. 295). During academic year 1978-1979, she participated in 26 such searches at public schools in Indiana and at the Michigan City and Pendleton Prisons and has undertaken such searches in 29 counties throughout the State of Indiana. (Tr. 295, 306). Whenever she is asked to provide dogs and personnel for school drug raids, she always takes part herself. (Tr. 296). She will provide dogs and personnel for such searches only upon the request of law enforcement agencies, and she has refused direct requests for the conduct of drug raids from school authorities, referring them instead to their own local enforcement agencies with the suggestion that the law enforcement bodies contact her. (Tr. 297). In this case, Mrs. Little was engaged by the Highland Police Department, and she presided over the initial planning session for the Highland school raid on March 14, 1979, at Highland Police Headquarters. (Tr. 162-163). Mrs. Little took an authoritative lead at that meeting, giving specific instructions to those present concerning, among other things, the execution of nude, or "strip", searches of students. (Tr. 252).

When engaged in matters relating to the conduct of drug raids in schools, Mrs. Little frequently wears a police-type poplin jacket displaying two badges. One badge reads "Police Canine", and the other features the legend "Edelheim Canine". Her uniform also incorporates a patch bearing a likeness of the flag of the United States. (Tr. 163, 308). When she attended the March 14, 1979, meeting at Highland Police Headquarters, she was garbed in this police uniform and she sported a sidearm. (Tr. 163).

Mrs. Little, wearing her police uniform, was present in the Highland schools for the entire operation on the day of the raid. She was accompanied by sixteen dog-handlers, some of whom were off-duty law enforcement officials from other jurisdictions. Also present were Al Prendergast, the then-incumbent chief of the Highland police; James Turoci, then the youth officer, and now the successor chief, of the Highland police; fourteen uniformed Highland police officers; and a uniformed, female Indiana conservation officer.

The dogs signaled alerts to their handlers by a means which was known to Mrs. Little and the handlers, but which they did not reveal to the other school and police authorities. (Tr. 253). Such alerts were deemed to indicate the presence of marijuana on or about the person or possessions of the student then being scrutinized, and the dog-handlers announced to the children and to the school and police authorities that alerts had been signaled. (Tr. 267).

Every student with respect to whom a dog alerted was compelled to submit to further, more extensive personal searches and interrogation, including patdowns and the emptying of pockets, in the cases of male students, and the emptying of purses, in the cases of female students. (Tr. 267). The dog-handlers decided when and if students would be required to remove their clothing and submit to body searches in the nude; in the presence of teachers, students, and newsmen, the dog-handlers announced their decisions, and such decisions were reviewed by no one. (Tr. 267-268).[4]

During the raid, police officers interrogated the students designated by the dog-handlers, subjected them to pocket, purse, and similar searches, and, in several cases, subjected them to nude searches. (Tr. 59-61).

By the end of the day, approximately 2,780 young people in the Highland schools had been subjected to the dog-search procedure. The dogs alerted about 20 times to students at the junior high school and about 30 times to students at the senior high school. No junior high school students were found in possession of contraband. The raiders found 17 high school

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[4] The dog-handlers entrusted with this authority included a gun shop owner, a trailer-maker, a food store clerk, a dairy farmer and his son, a housewife and her son, and two men whose occupations and qualifications are completely unknown. (Tr. 290-292). Also counted among the handlers were deputy sheriffs from Fulton, Lake, and Starke Counties in Indiana, police officers from LaPorte and Merrillville, Indiana, and an Indiana conservation officer. (Tr. 284-287, 289-290).

students in possession of materials initially thought to be illicit. All were immediately and summarily suspended. Fifteen of them were subsequently recorded as having withdrawn from school voluntarily; the other two students were reinstated, and it appears that they had been wrongly accused of possessing illicit drugs. The contraband uncovered by the police dogs and their handlers consisted of marijuana, paraphernalia suspected of use in marijuana consumption, and three cans of beer. The dogs were not trained to detect beer. (Tr. 99, 121, 131-132, 202-210, 227).[5]

Petitioner was among the Highland students subjected to the full array of search procedures. She went to school, as usual, on March 23, 1979. Her first-period class at the junior high school, consisting of one teacher and about 28 students, convened at 8:20 a.m. Its normal time of adjournment was 9:15 a.m.; on that day, however, it did not end until about 11:05 a.m. (Tr. 57, 83, 141).

When the usual time of adjournment was reached that morning, the teacher informed Diane Doe and her classmates that the class would be held over because the school had a "surprise" for the students. The students were told to do school work or mathematical puzzles or to rest quietly. Throughout the morning, no one was allowed to leave the room or to go to the washroom. (Tr. 57-59).

At some time after 9:15 a.m., there arrived at the door of the classroom a German shepherd dog, a dog-handler, two uniformed Highland police officers, and an assistant principal

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[5] Far from being "inherently suspect" as a hot-bed of drug trafficking, the Highland senior and junior high school campus seems remarkably sedate in light of the draconian remedies pursued by the police and school authorities. The fifteen students who were found with marijuana, paraphernalia, and beer during the Highland raid barely accounted for one-half of one percent of the student population of 2,780. Highland school officials concede that drug abuse conditions in their school are about the same as, and are possibly better than, those prevailing elsewhere. (Tr. 125-126, 134-135).

of the junior high school. The dog, accompanied by the police and school authorities, entered the room and proceeded from desk to desk and from student to student. Each student was probed, muzzled, and sniffed by the dog and visually inspected by the handler. (Tr. 59-61). When the dog reached Diane Doe, who was sitting in her assigned seat, it sniffed her body with its nose and repeatedly pushed its nose and its muzzle into her legs. (Tr. 59-61, 159). A uniformed police officer ordered Petitioner to stand up and to empty her pockets. The dog-handler walked the canine to the girl's side, and caused the dog to sniff her again. (Tr. 61). A uniformed police officer thereupon ordered her to go to the school nurse's office, to which she was escorted by a male teacher. (Tr. 65-66).

At the nurse's office, Diane Doe was handed over to a uniformed female police officer and to another woman, not a school employee, who turned out to be a family acquaintance. The two adult women commanded Petitioner to remove all of her clothing, and the girl complied, taking off her clothes in the presence of the women. The women looked over her body, touched and examined her hair, and inspected her clothing, all while the girl was completely or partially nude. She was eventually allowed to replace her clothing, and she was escorted back to her classroom. She returned to class about one-half hour after she had been taken from it. (Tr. 66-70).

No contraband of any kind was ever found in Diane Doe's possession, nor was Petitioner ever determined to be, or even suspected of being, under the influence of any drug or stimulant. (Tr. 66-70). Mrs. Little admitted at the trial that she could not justify why Diane Doe was subjected to a nude search. (Tr. 303).

Diane Doe's testimony showed that she was shocked by the appearance and presence of the dog in her classroom. She was embarrassed by being singled out for repeated examination and for repeated sniffing by the dog, and by being singled out and commanded to report to the nurse's office under escort.

She was also embarrassed by being required to remove all of her clothing in the presence of a stranger, the uniformed police officer, and of a family acquaintance, and to be touched and examined by them while she was naked. Further, she was embarrassed and humiliated upon her return to the classroom by the excited curiosity, comments, and jokes of her fellow students, and by being made the subject of discussion by classmates and the community.[6] The entire event angered, humiliated, and degraded her. (Tr. 60, 63, 72-75, 87).

This action was brought under the Fourth, Fifth, and Fourteenth Amendments, 42 U. S. C. § 1983, and 42 U. S. C. § 1985(3), seeking a declaratory judgment holding such conduct violative of the United States Constitution; injunctive relief on behalf of the class of Highland students; and damages on behalf of Petitioner and her parents.

The district court refused to certify the class and upheld the constitutionality of all aspects of the dog-search procedure except the nude searches. The district court granted declaratory judgment holding the strip-search of Petitioner unconstitutional, but denied damages for it on the ground that, as a matter of law, the unconstitutionality of such searches was not so well-settled a principle of law that the school and police authorities should be held accountable thereunder.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit from all aspects of the trial court's decision, except for its award of declaratory relief against the nude searches. Respondents took no appeal.

The panel of the court of appeals affirmed the trial court's opinion by adopting it, save on the issue of damages for the nude search. The panel there reversed the lower court, holding that, as a matter of law, the strip-searches were so patently unconstitutional and "a violation of any known principle of

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[6] Representatives of the press and other news media, invited in by the authorities, entered the schoolhouses and classrooms during the raid and observed the searches while in progress. (Tr. 191-192).

human decency" that liability for damages must attach, at least as against the school authorities. *Doe* v. *Renfrow*, 631 F. 2d 91, 93 (1980), App. at 4b. The panel ordered the case remanded to the trial court for a determination of damages.[7]

Respondents petitioned the court of appeals for rehearing, asking the Seventh Circuit to state explicitly whether or not the Highland police authorities shared equally in the liability of the school authorities to respond in money damages. Respondents' application for rehearing was denied without opinion on August 1, 1980.

Petitioner also applied for a rehearing in the court of appeals, and suggested that the rehearing be held *en banc*. Rehearing was denied to Petitioner on November 3, 1980, by an evenly-divided court of appeals. Opinions dissenting from the order denying the petition for rehearing were filed by Chief Judge Fairchild and Judges Swygert, Wood, and Cudahy. Their dissents from the denial of rehearing are reported with the panel's *per curiam* opinion at 631 F. 2d 91, and are contained in the appendix hereto at 2c-6c.

Petitioner here seeks review of the judgment of the court of appeals that the dragnet, dog-search procedure was constitutional and of the refusal of the court of appeals to grant declaratory and injunctive relief to the class of Highland High School and Junior High School students against such conduct. Petitioner requests that a writ of certiorari be issued to the court of appeals, so that this Court may review the decision of that divided tribunal.

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[7] Petitioner has moved the court of appeals, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, to stay the issuance of its mandate pending the disposition of this Petition, and thus to diminish the likelihood of multiple trials on damages. The court of appeals granted the stay on November 17, 1980. On November 13, 1980, the mandate issued improvidently, and was recalled by the court of appeals, acting *sua sponte*, on November 25, 1980. The stay was renewed on December 17, 1980, and again on January 7, 1981, pending the filing of this Petition.

REASONS FOR GRANTING THE WRIT

I.

This Case Involves Questions of Exceptional Importance.

This is a case where local police and school officials resorted to governmental terrorism in the name of deterring drug abuse. Thousands of American public schoolchildren were detained *en masse* in their schoolhouses, without any articulable basis for any suspicion that any wrong of any kind had been committed by anyone. Without warning, and without warrants, they were subjected to personal searches by police dogs, pocket searches and interrogations by police officers, and, for some children, strip-searches by police personnel. All of this conduct, save for the nude examinations themselves, was undertaken in the presence of print reporters and television newsmen, so to dramatize the lesson *in terrorem*. This case presents a ripe opportunity for review by this Court of a troubling police and school practice growing in frequency and significance.

The opinion of the panel of the court of appeals ignores the search and seizure, detention and arrest, and class-certification questions that the facts here beget. Instead, it affirms with minimal comment the trial court's opinion on those points, which it adopts as its own.

Yet, at the same time, the panel's opinion departs vigorously from the district court's decision on the matter of damages. It does so in terms that are unusually forceful, clearly undercutting the authority in which the court of appeals cloaked the remainder of the trial court's opinion on the constitutionality of the overall search procedure:

> It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude. More than that: it

> is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law" [*Wood* v. *Strickland,*] (420 U. S. [308] at 321, 95 S. Ct. [992] at 1000 [1975].
>
> *Wood* v. *Strickland,* [420 U. S. 308 (1975)], accords immunity to school officials who act in good faith *and within the bounds of reason.* We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles. It is not enough for us to declare that the little girl involved was indeed deprived of her constitutional and basic human rights. We must also permit her to seek damages from those who caused this humiliation and did indeed act as though students "shed at the schoolhouse door rights guaranteed by *** any *** constitutional provision" ([*Doe* v. *Renfrow,*] 475 F. Supp. [1012,] at 1023).

Doe v. *Renfrow,* 631 F. 2d 91, 92-93, App. at 4b, (7th Cir. 1980) (*emphasis in original*).

It seemed to the police and school officials who perpetrated the raid on March 23, 1979, and to the trial court, that the progression from mass detention to dog-sniffing to interrogation to pocket searches to nude searches was natural and logical, shaded only by degrees. The panel of the court of appeals saw, but could not explain, a sharp differentiation which escaped both the perpetrators and the trial court. In fact, conduct of the kind undertaken by the Highland authorities probably does progress with a logic of its own, each step eliding into the next. Petitioner concurs with the panel that a clear line must be drawn, but respectfully submits that the line should properly fall before even the mass detention begins.

The trial court, in that part of its opinion which was adopted by the panel of the court of appeals, held that,

> "this is not a police action and . . . the students did not have a justifiable expectation of privacy that would pre-

> clude a school administrator from sniffing the air around the desks with the aid of a trained drug detecting canine. The use of the dog in this operation was an aid to the school administrator and as such its use is not considered a search."

Doe v. *Renfrow,* 475 F. Supp. 1012, 1022, App. at 16a-17a, (N. D. Ind. 1979). It is by such reasoning that the trial court and the court of appeals would take the whole schoolhouse raid, right up to the nude search, entirely out of the ambit of the Fourth Amendment.

Such a conclusion represents a grave perversion of constitutional doctrine. Judge Swygert was direct in his dissent from the denial of rehearing:

> In my view, the circumstances of March 23 can hardly be likened to the observation of a school administrator, sniffing the air about him as he goes about his business. Here there was evidence that the trained dogs ran their noses along pupils' legs, actually touching the bodies of the students.
>
> The cases cited by the district court as holding that sniffing dogs do not constitute a search are totally inapposite because in those cases the dogs were sniffing inanimate and unattended objects rather than people. Here the intrusive probings by the dogs were in no sense mere observation of " 'physical characteristics . . . constantly exposed to the public,' . . . [but] constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp* v. *Murphy,* 412 U. S. 291, 295, 93 S. Ct. 2000, 2003, 36 L. Ed 2d 900 (1973) (citations omitted). *See also United States* v. *Kenaan,* 496 F. 2d 181 (1st Cir. 1974). We need not speculate afar about the psychological trauma suffered by the students during this mass search. The accusing finger of the police may well remain for a lifetime upon these young, impressionable minds.
>
> Had a warrant properly been sought, I am convinced that none could have issued consistent with the Fourth Amendment. The police and school officials neither possessed nor attempted to gain specific information about

> any particular student. There was also no information as to any particular drug or contraband transaction or event. Thus, all 2,780 students were under suspicion, and there was no known crime."

Doe v. *Renfrow*, 631 F. 2d 91, 94, App. at 3c-4c, (7th Cir. 1980) (Swygert, J., dissenting from denial of rehearing).

Whatever the proper rules may be, police and school authorities, as well as parents and children, in numerous jurisdictions across the country seek guidance on the problems addressed in this case. The fundamental question, in practical terms, is how far may police and school authorities go in undertaking joint, exploratory, schoolhouse searches of students detained *en masse?* It appears to be the conclusion of the court of appeals that anything is permissible, provided that clothing is not removed. Petitioner contends that such a sweeping rule would run afoul of the Constitution and of the teachings of this Court thereunder. Those arguments are raised *infra*. But such a rule, announced as in the panel's opinion—the dog raids quietly upheld, the strip searches angrily rejected—confuses rather than settles the issues which the rule purports to address. Wherever the line is ultimately to be drawn, the problem merits a full airing of issues, a clear explanation for the results, and settlement by this Court.

II.

The Judgment of the Court of Appeals Conflicts With Decisions of This Court.

A. Search and Seizure Issues.

The panel of the court of appeals upheld, through partial adoption of the trial court's opinion, the constitutionality of a pattern of warrantless detentions and personal intrusions by police and school authorities based solely on the location and class-identity of the mass of persons searched. Highland's students were detained and inspected *en masse* solely because

they were schoolchildren in a schoolhouse. There was no suspicion whatsoever that a crime had been, was being, or was about to be committed. No suspicious conduct was observed. The search was purely a dragnet, with no pretense of neutrality and no effort to conform to inspectional criteria of any kind. Highland's authorities executed a plan with no deliberate purpose save to see what a search of the student body might disclose.

Petitioner respectfully submits that such conduct is unconstitutional under the teachings of this Court. In *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Court held that specific and articulable facts leading to suspicion of wrongdoing by a particular person at a particular time are necessary to justify intrusion into his security or privacy. In *Davis* v. *Mississippi*, 394 U. S. 721 (1969), a case involving a crime whose perpetrator was known to be a black male, this Court struck down an arrest which followed upon the mass detention of black men, more or less conforming to the description of the suspect, found in the general area of the crime. In *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), the Court held unconstitutional the mass investigatory detention, interrogation, and search by police of all patrons in a bar suspected of being a venue for illicit drug trafficking. In *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978), this Court held that even "health and safety," as opposed to "criminal," inspections are subject to the warrant requirements of the Fourth Amendment, and must be based on a "plan containing specific neutral criteria." In *Torres* v. *Puerto Rico*, 442 U. S. 465, 474 (1979), this Court declared that "we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement."

The trial court attempted to minimize the significance of police participation in the Highland raid, suggesting that,

> school officials can secure proper aids to supplement and assist basic human senses. In doing so, it should be emphasized that the defendants proceed as *school officials* and not, per se, as policemen. * * * In the execution of this plan, the school officials sought the aid of other trained persons who had relevant talents from various community sources. Various police departments were one such resource. Ms. Little with her vast experience in the training of dogs was another resource.

Doe v. *Renfrow,* 475 F. Supp. 1012, 1026, App. at 26a, (N. D. Ind. 1979). As Judge Swygert observed, however, this cannot be deemed "a 'school' case because the mass search was planned and executed with extensive police involvement rather than solely by school personnel."*Doe* v. *Renfrow,* 631 F. 2d 91, 94, App. at 4c, (7th Cir. 1980) (Swygert J., dissenting from denial of rehearing). Judge Swygert correctly noted, however, that,

> even considered in the context of "school" cases, there was no reasonable suspicion here to justify the mass search. *See M. M.* v. *Anker,* 477 F. Supp. 837 (E. D. N. Y.), *aff'd,* 607 F. 2d 588 (2d Cir. 1979). Nor was the constitutional violation abrogated by the fact that the police did not plan any arrests. The Fourth Amendment protects against unreasonable searches and seizures because of "the right of the people to be secure in their persons" whether or not an arrest would necessarily follow.

Doe v. *Renfrow,* 631 F. 2d 91, 94, App. at 4c, (7th Cir. 1980) (Swygert, J., dissenting from denial of rehearing).

This Court has held repeatedly that students do not shed their constitutional rights at the schoolhouse door. School authorities, when acting in conjunction with the police, and even when acting within the scope of their own governmental authority, may neither abridge nor waive the rights of students guaranteed under the First Amendment, *Tinker* v. *Des Moines Independent School District,* 393 U. S. 503 (1969), or under the Due Process Clauses of the Fifth and Fourteenth Amendments, *Wood* v. *Strickland,* 420 U. S. 308 (1975); *Goss* v. *Lopez,* 419

U. S. 565 (1975); *In re Gault,* 387 U. S. 1 (1967); and *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624 (1943). The court of appeals would reshape the body of this Court's teachings regarding the fundamental rights of students, and would except rights guaranteed by the Fourth Amendment from the body of elemental human rights against unwarranted governmental intrusions.

B. Class-Certification Issues.

The trial court and the court of appeals denied the class-certification proposed below by Petitioner under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Petitioner proposed a class consisting of "the 2,780 persons who, during academic year 1978-1979 were enrolled as students at Highland High School and at Highland Junior High School in Highland, Indiana; all persons who were subject to the detention, custody, arrest, search, and seizure by school and police authorities at said schools on March 23, 1979; and all persons who now are, or who hereafter shall be, enrolled as students in said schools." *See* Plaintiffs' Proposed Findings of Facts, Conclusions of Law, and Decree at 27 (July 16, 1979).

The trial court held that,

> [t]hose members of the proposed class are not so numerous as to make joinder of them as parties inpracticable. Fifty students were alerted to by the drug detecting canines on the morning in question. * * * It is also very clear from the record that some students in this high school are not in sympathy with the claims and contentions of this plaintiff. This Court finds that joinder would have been permissible.
>
> . . .

Doe v. *Renfrow,* 475 F. Supp. 1012, 1028, App. at 30a, (N. D. Ind. 1979).

This Court has long recognized that class-certification under Rule 23(b)(2) is a device intended to provide class relief in civil rights cases. *See Allee* v. *Medrano,* 416 U. S. 804 (1974), a case in which the Court approved class injunctive

relief against a potentially recurring pattern of police misconduct.

The contours of the present class are determined by the actions, past and present, of the school and police authorities. Highland's law enforcement and public school officials have targeted the senior and junior high school population of their town for a concerted program of custody, detention, and searches in connection with schoolhouse drug raids utilizing drug-detecting dogs. As the raid program is pursued by its perpetrators, they define, by their own conduct, a class of victims worthy of certification under Rule 23(b)(2). The foreclosure of class relief by the lower courts defeats the intentions of the framers of Rule 23(b)(2), and ignores the reading given to that Rule by this Court in decisions such as *Allee* v. *Medrano, supra.*

Petitioner respectfully requests, therefore, that a writ of certiorari be issued to the court of appeals in order to secure the conformity of the judgments of the lower tribunals with the teachings of this Court.

III.

Review by This Court Will Secure Uniformity of Decisions Among the Lower Courts.

On September 3, 1980, the United States District Court for the Eastern District of Texas decided *Jones* v. *Latexo Independent School District,* 499 F. Supp. 223 (E. D. Tex. 1980). That case involved facts nearly identical to those present here, save that no nude searches were undertaken in Texas. In that case, Chief Judge Justice considered and rejected the holding below in the case at bar:

> The only case decided to date on facts even remotely resembling those now before the court is *Doe* v. *Renfrow,* 475 F. Supp. 1012 (N. D. Ind. 1979) (*appeal pending*). The court's approval of a blanket high school sniff-search

> in that case stemmed from an erroneous view that the dog merely augmented or enhanced school officials in their own inspection of the school. *Id.* at 1022. As noted above, however, a "sniffer dog" actually perceives odors undetectable to humans, much as an electronic listening device picks up sounds inaudible to the human ear. *Doe* v. *Renfrow* has been justifiably criticized by legal writers on this and other grounds. *See* "The Constitutionality of Canine Searches in the Classroom", 71 *Journal of Criminal Law & Criminology* 1 (1980); Helfer, "Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?", 24 *St. Louis U. L. J.* 119 (1979).

Jones v. *Latexo Independent School District, supra,* 499 F. Supp. at 236. The result in the Texas case included the issuance of an injunction prohibiting local authorities from using "sniffer dogs" to search the persons or property of the plaintiffs in the absence of reasonable cause to believe that those particular individuals were in possession of contraband in violation of school rules.

In light of the conflicting results reached in *Doe* v. *Renfrow, supra,* and *Jones* v. *Latexo Independent School District, supra,* the law regarding the constitutionality of mass schoolhouse detentions, combined with drug searches led by police dogs, is perilously muddled. Two district courts have spoken in diametric opposition to one another. A court of appeals, which is evenly divided on granting rehearing *en banc,* has entered a panel decision containing anguished internal inconsistencies.

The present case raises constitutional questions which are plainly substantial and ripe for decision. Their resolution by this Court will end the conflicts below, and will give vital guidance forestalling the abuses, injuries, and lawsuits which otherwise, inevitably, will come.

IV.

The Judgment of the Court of Appeals Misapprehended Significant Facts of the Case, Thereby Working Substantial Injustice.

The *per curiam* opinion of the panel of the court of appeals states that, on August 30, 1979, "Judge Sharp dismissed the action on the merits as to the Highland police chief and dog trainer Patricia Little because they did not participate in the strip search." *Doe* v. *Renfrow,* 631 F. 2d 91, 92, App. at 2b, (7th Cir. 1980)(*per curiam*). The trial court granted summary judgment in favor of Mrs. Little and the Highland police chief on the strength of its finding that they had not participated in any way with the individual strip-search of Petitioner. *Doe* v. *Renfrow,* 475 F. Supp. 1012, 1027, App. at 28a, (N. D. Ind. 1979).

The trial court's finding is clearly erroneous. Patricia Little is more than a mere "dog-trainer". She is a deputy sheriff of Miami County, Indiana, (Tr. 276); she trained and supplied the police dogs used in the Highland raid, (Tr. 277, 290-292); she helped to plan the Highland raid and was present during it, (Tr. 162-163, 187-188, 242); she wore a police uniform and carried a sidearm during those events, (*Ibid.*); she supplied and led all of the dog-handlers for the raid, (Tr. 110, 265, 278-290); and she gave the instructions which controlled the execution of the entire raid, including the strip-searches, (Tr. 252).

What is more, each decision to strip-search a particular student was made by Patricia Little and her dog-handlers. (Tr. 253, 267). The decision was communicated by them to the subordinates of the chief of police, and by the police officers to the students. (*Ibid*). Thus, Diane Doe was ordered to submit to a strip-search by a police officer. (Tr. 65-66). The nude search of Petitioner was actually conducted by a police officer (a female subordinate of the chief of police) and by another woman brought in for that purpose by the police. (Tr. 66-70). In addition, both the then-incumbent and the current chiefs of

police, along with numerous subordinate police officers, took part in planning the search and were actually present on campus throughout the drug raid.

Thus, both the police chiefs and Mrs. Little were intimately involved in the entire proceeding, including, specifically, the strip-search of Diane Doe. Police as well as school officials were responsible for the nude search, and they should all be required to respond in damages for their joint conduct. In relieving Mrs. Little and the Highland police from liability for damages, the lower courts have worked substantial injustices not only against Petitioner, but also against the Highland school authorities, who are left to stand alone. This Court should command the Highland police and Deputy Little to stand responsible for their deeds.

CONCLUSION

The public interest requires enforcement of the laws against drug abuse. But it would be intolerably destructive of the fabric of ordered liberty to effect such law enforcement at the expense of rights safeguarded by the Fourth, Fifth, and Fourteenth Amendments. The Court and the parties should be mindful of the words of Mr. Justice Jackson, soon after his return to the United States Supreme Court from his service as a prosecutor at the Nuremberg Trials:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalogue of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Brinegar v. *United States*, 338 U. S. 160, 180 (1949) (Jackson J., dissenting).

The public interest requires, therefore, that, with the exception of the judgment declaring the unconstitutionality of the nude search of Diane Doe and of the liability of the Highland school authorities to respond in damages for it, the decision of the United States Court of Appeals for the Seventh Circuit should be reviewed upon a writ of certiorari, and should be reversed.

Respectfully submitted,

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Chicago, Illinois
February 2, 1981.

APPENDIX

A. The decision of the United States District Court for the Northern District of Indiana. (August 30, 1979) 1a
B. The decision of the United States Court of Appeals for the Seventh Circuit. (July 18, 1980) 1b
C. The order of the United States Court of Appeals for the Seventh Circuit denying rehearing *en banc*, and opinions dissenting therefrom. (November 3, 1980) 1c

**Diane DOE, by Robert and Naomi Doe,
her parents and next friends,
Plaintiffs,**

v.

Omer RENFROW, Superintendent of Highland Town School District, George Kurteff, Principal, Highland Senior High School, Harvey Keim, Principal of Highland Junior High School, John Guiden, Lorraine King, Lawrence Vasser, Burton Masepohl, John Terpstra, members of the Highland Town School District Board, Al Prendergast, Police Chief, Highland, Indiana, Patricia Little, Individual Intervenors, Defendants.

No. H 79-233.

United States District Court,
N. D. Indiana,
Hammond Division.

Aug. 30, 1979.

MEMORANDUM AND ORDER

ALLEN SHARP, District Judge.

I. *Introduction*

This action was initiated in a complaint filed by several named plaintiffs protesting certain procedures conducted by officials of the Highland, Crown Point and Merrillville, Indiana school systems. Those named plaintiffs alleged that search activities conducted by certain school officials assisted by local police officers violated the plaintiffs' rights secured by the Fourth and Fourteenth Amendments to the Constitution. Subsequent to oral argument and upon the granting of a motion to dismiss certain party plaintiffs, made by plaintiffs' counsel, only Diane Doe and her parents as next friends remain as plaintiffs in this action. After extensive oral argument and

presentation of evidence on June 7, 1979, this Court dismissed all but the above captioned defendants. Several hundred parents or patrons of the Highland School System were permitted to intervene as party defendants.

Plaintiff, Diane Doe, seeks to have the actions of the defendant school officials, the police chief of the Highland Police Department and the dog trainer to be declared violative of her constitutional rights guaranteed by the Fourth and Fifth, Ninth and Fourteenth Amendments to the Constitution. The plaintiff further seeks to have the complained of activities of the named defendants permanently enjoined. Plaintiff brings her action pursuant to both sections 1983 and 1985 of Title 42 U.S.C. Also requested by plaintiff is a class certification of all persons who were enrolled at Highland High School and Highland Junior High School who were subject to the complained of activities or those who would be enrolled hereafter as such students in those institutions. Such a class would be certified pursuant to F.R.C.P. 23(b)(2). Presentation of any evidence of possible damages was reserved until this Court's determination on the above issues.

Jurisdiction in this matter for purposes of deciding any and all questions concerning plaintiffs' request for an injunction against the named defendants is pursuant to 28 U.S.C. §§ 1343(3) and 1343(4).

This document shall constitute the Court's findings and conclusions of law as required by F.R.C.P. 52.

II. *Facts*

At issue in this law suit is the constitutional propriety of an investigation conducted by administrators of the Highland school system assisted by local police officers at the Junior and Senior High Schools in Highland, Indiana.

Highland, Indiana is a community consisting of approximately 30,000 residents located in the northwest corner of the state in Lake County, Indiana. The school community of Highland has, among several elementary schools, a Junior and Senior High School. Both these campuses are located on the same site. The school buildings are adjacent to one another and the approximately 2,780 students of both schools share common facilities located in the buildings.

Although the problem of illicit drug use within the schools was not a novel one in Highland before 1978, it became progressively more acute and more visible within the Senior and Junior High Schools during the 1978 academic year. Beginning in the fall of that year, concern over drug use within the school intensified as school officials recorded instances of drug use by students. From September 1978 to March 22, 1979, twenty-one instances were recorded when students were found in possession of drugs, drug paraphernalia or alcohol, or under the influence of drugs. More alarming to school officials was the fact that of those twenty-one instances, thirteen occurred within a twenty school day span just prior to the complained of activities.[1] Also, during this four week period, school administrators received daily reports from faculty, students and parents concerning the use of drugs within the Junior and Senior High Schools.[2] Out of these general reports, two students were identified as drug users, however, after investigation by school officials, no evidence of any drug use was found concerning the named students.

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[1] The 13 students involved in drug related incidents were withdrawn from the school system. Testimony at trial indicated the students used several types of drugs including alcohol, marijuana, and PCP, an animal tranquilizer.

[2] These reports consisted of direct communication between teachers at the Junior and Senior High School and school administrators, either face to face or by signed written notes; by student tips, usually anonymous, by letters from parents, and by telephone calls, also, usually anonymous.

Throughout the year, and especially during this four week period, school officials, teachers and even members of the student body became concerned about the negative impact the use of drugs within the school was having on the educational environment. Classroom disruptions and the concomitant loss of learning time occurred as a result of disciplining those students found to have been using drugs in the school during the regular school hours. Moreover, there was a feeling, at least by some students including the plaintiff, that peer pressure existed in favor of using drugs while on campus. Not to use drugs was considered not to be "cool" by members of the student body who did use drugs. Because of the increasing use of drugs within the school, students, faculty and administrators suffered a loss of morale at both the Senior and Junior High School.

To combat what was perceived as an increasingly alarming drug problem within the school system, members of the Highland Town School District Board suggested the use of properly trained dogs to search for drugs within the school building. The use of drug detecting canine units was discussed at the March 6, 1979 meeting of the Board of the Highland Community School District and Superintendent of Schools, Omer Renfrow. Renfrow decided to use the trained dogs in a drug investigation and he arranged a second meeting for March 14, 1979. This meeting was attended by school administrators of the Senior and Junior High Schools and by members of the Highland Police Department.[3] Also present at this meeting was Patricia Little, a trainer of drug detecting canines. Little was asked to

[3] Persons in attendance were: George Kurteff, Principal of Highland High School; Harvey Keim, Principal of Highland Junior High School; Merlin Clinkenbeard, Assistant Principal of Highland High School; Al Prendergast, Chief of Police, Highland Police Department; Lt. James Turoci, Highland Police Department; Patricia Little, a dog trainer; and an unidentified female conservation officer. Renfrow was not present.

attend because she had had experience in the field of canine searches in schools.[4]

At this meeting, the school administrators informed the police officers that they intended to conduct an investigation within the school buildings using canine units to detect and remove any narcotics or narcotic paraphernalia. To carry out this procedure, they requested the assistance of the Highland Police Department and of volunteer canine units experienced in drug detection. The objective was to rid the Junior and Senior High Schools of illicit drugs and discourage further drug use on the campuses. The school officials insisted, and the police agreed, that no criminal investigations would occur as a result of any evidence recovered during the school investigation. The school officials did intend, however, to bring any necessary disciplinary actions against students found in possession of contraband.

A. *Activities Inside The School*

On March 23, 1979, a school wide drug inspection was conducted by the administrators of the Highland School System with the assistance of the Highland Police Department and volunteer canine units trained in marijuana detection. The inspection occurred in both the Junior and Senior High School campuses and began during the first period class. Teachers were informed of the inspection that morning by means of a sealed note upon their classroom desks. Each classroom teacher was instructed to keep their students in the first period class and to have them perform their customary work. A canine team visited each classroom in both the Junior and Senior High School buildings. Each team consisted of a school adminis-

[4] Renfrow requested information from the Highland Police Department concerning the use of trained canine units for the planned investigation. Little was contacted by the police department requesting her to attend the March 14, 1979 meeting.

trator or teacher, a dog and its handler and a uniformed police officer. Four such teams were used in the Senior High School building and two were operating in the Junior High School rooms. Students were instructed to sit quietly in their seats with their hands and any purses to be placed upon their desk tops while the dog handler introduced the dog and led it up and down the desk aisles. The canine teams spent approximately five minutes in each room. No incidents of disruption occurred in the classrooms because of the presence of the dogs or the teams. The entire investigation lasted approximately two and one-half hours during which time students wishing to use the washrooms were allowed to leave the classroom with an escort of the same sex to the washroom door. The administrative purpose of the escort was to prevent the disposal of any drugs on the way to the washroom. No students were observed while in the washrooms. In order to keep disruptions to a minimum, late arrivals at the school were directed to a room other than their regular first period classroom. Uniformed police officers and school administrators were present in the halls during the entire investigation. Custodians were present near all locked doors to provide immediate exit if necessary. During the inspection, a dog alerted[5] to a particular student on approximately fifty occasions. After each alert, the student was asked to empty his or her pockets or purse. A body search[6] was conducted with respect to eleven students because the dog continued to alert after the student had emptied pockets or purse. Plaintiff Doe was one of those students to which a dog continued to alert after she emptied her pockets. She was

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[5] An alert is an indication of a trained canine that the odor of the drug, in this case marijuana, is present in the air or upon the individual.

[6] Although it was not properly defined at trial, a body search was something less than the nude search that plaintiff complains she was subject to. Body searches involved extensive examination of the student's clothing entailing the removal of some of the garments.

quietly escorted to a nurse's station in the Junior High School and was asked to remain in the waiting room. Upon being asked to enter the inner office, two women introduced themselves to the plaintiff. One was a friend of the plaintiff's mother. Plaintiff was asked if she had ever used marijuana to which she answered she had not. She was then asked to remove her clothing. She was permitted to turn her back to the two women while she was disrobing. Upon removal, her clothing was briefly examined, her hair was lifted to determine if any substances were hidden in it, and she was immediately permitted to dress. No marijuana or other drugs were found in plaintiff's possession, although it was later discovered that plaintiff had been playing with one of her dogs that morning of the search and that dog was in heat.

As a result of the investigation seventeen students were found in possession of drugs; twelve of those students withdrew voluntarily from school and three students were expelled pursuant to the due process statutes of the State of Indiana. I.C. 20-8.1-5-5 et seq. Additionally, two students were suspended by the administration because they were found to be in possession of drug paraphernalia.

B. *The Canine Units*

Ms. Patricia L. Little is the owner and operator of the Edelheim Police K-9 Academy in Bunker Hill, Indiana. The academy trains and certifies dogs and their handlers in the detection of marijuana and explosives as well as in tracking and attack. Little is also a sworn, non-paid and non-uniformed Deputy Sheriff of Miami County, Indiana. All the animals used in the March 23, 1979 inspection were certified and trained by Little at her academy. Upon request of the Highland School officials, Little agreed to provide the necessary trained dog units for the March inspection. She contacted the various dog handlers in regard to their availability for the inspection

informing them of the time and place. Each handler participated as an unpaid volunteer with their own dogs.[7]

On March 23, 1979 Little met with representative of the Highland Town School District, the Highland Police Department and the dog handlers. Little's main responsibility was to coordinate the efforts of the school officials with the dog handlers. Patricia Little herself did not participate in any capacity other than as a volunteer dog trainer. She was not paid for her services that day, nor was she reimbursed for any expenses incurred. Although she wore a jacket with her academy's patch sewn on the sleeve and an American flag patch attached to the other sleeve, she did not wear the uniform of any law enforcement agency. She was not armed.

During the inspection, Little and each of the other dog handlers involved knew the individual alerts their dogs would give in the presence of any marijuana or marijuana paraphernalia. They also knew the intention by school officials to ask certain students to empty pockets or purses if the dog's alert continued. Little did not suggest that a strip search procedure be implemented nor did she know that a strip search was conducted the day in question until after the inspection. Moreover, the decision to strip search an individual student was solely the responsibility of the school officials. However, Little and the other trainers did advise the school officials, upon their dogs' continued alert, of the necessity of a pocket and/or purse search. Fourteen handlers and their dogs participated during

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[7] Plaintiff emphasizes the occupations of the volunteer dog handlers used in this investigation as being predominately law enforcement employees. Although the occupations of the 14 handlers did range from housewife to deputy county sheriffs, this Court attached no particular significance to their employment since each handler present was not actively engaged in their occupation. Moreover, each handler provided their dog at their own expense and was not representing any law enforcement agency while at the schools.

the inspection. Little and her dog were accompanied by a school official and a Highland Police officer during her portion of the inspection, limited only to the Senior High School. Little did not have any knowledge of, or direct involvement in, the search of plaintiff, Doe.

III. *The Fourth Amendment*

This Court is specifically confronted with the following issues: (1) whether the investigative procedure used by the school officials with the assistance of law enforcement officers, for the sole and exclusive purpose of furthering a valid educational goal of eliminating drug use within the school, was a seizure and search under the Fourth Amendment; (2) whether the use of dogs to detect marijuana and marijuana paraphernalia in the classroom was, standing alone, a search under the Fourth Amendment; (3) whether the admitted search of a student's clothing upon the continued alert of a trained drug detecting canine was violative of rights protected by the Fourth Amendment; and (4) whether the nude body search conducted solely upon the basis of a trained drug detecting canine's alert violated the plaintiff's right to be free from unreasonable search and seizure.

Plaintiff's contentions present before this Court unique issues both in the area of law concerning the Fourth Amendment and searches of students in public schools[8] and in the area

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[8] Buss, *The Fourth Amendment and Searches of Students in Public Schools,* 59 Iowa L.Rev. 739 (1974); Donoghoe, *Emerging First and Fourth Amendment Rights of the Student,* 1 J.L. and Educ. 449 (1972); Note, *Students and the Fourth Amendment; Myth or Realty?,* 46 U.M.K.C.L.Rev. 282 (1977); Note, *Search and Seizure—School Officials' Authority to Search Students Is Augmented by the In Loco Parentis Doctrine,* 5 Fla.St.U.L.Rev. 526 (1977).

of the use of canine units trained to detect evidence of drugs.[9] This latter area also has implications in the public school context.

A. *The General Inspection*

Considering first plaintiff's contention that the investigation of March 23, 1979 constituted a mass detention and deprivation of freedom in violation of the Fourth Amendment, this Court finds the assertion to be without merit. Plaintiff, as well as other students, is subject to the daily routine of class attendance in an educational environment. During an eight hour day, students must move from room to room, attending classes designated by the administration and taught by teachers hired by the school system. Students are made to change this routine every year, if not every semester. Movement from class to class entails

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[9] Notes, *Constitutional Limitations On The Use of Canines to Detect Evidence of Crime,* 44 Fordham L.Rev. 973 (1976); Comments, *United States v. Solis: Have The Government's Supersniffers Come Down With A Case Of Constitutional Nasal Congestion?,* 13 San Diego L.Rev. 410 (1976). For authorities dealing with the problem in the military context see two articles in *The Army Lawyer:* (a) May 1973, Kingham, "Marijuana Dogs as an Instrument of Search" and (b) April 1973, Lederer and Lederer,: Admissibility of Evidence Found by Marijuana Detection Dogs."

Realizing fully that the military cases are not dispositive of or binding precedent on the issues raised here, the history of the manner in which the Court of Military Appeals has approached the problem is revealing. See *U. S. v. Unrue,* 22 U.S.C.M.A. 466, 47 C.M.R. 556 (1973); *U. S. v. Thomas,* 1 M.J. 397 (C.M.A. 1976)(a three way split on critical issues); *U. S. v. Paulson,* 7 M.J. 43 (April 9, 1979), reversing on other grounds 2 M.J. 326 (A.F.C.M.R. 1976); and *U. S. v. Grosskreutz,* 5 M.J. 344 (C.A.M.1978). The question of dog searches has again been certified by the Court of Military Appeals and remains pending there. See *U. S. v. Middleton,* 3 M.J. 425 (C.M.A.1977).

intrusions upon the students' freedoms. Times allocated for each class period are determined by the school officials, not the students. Plaintiff must attend the scheduled classes for the times designated. It was not unusual for students to be kept in their classrooms longer than the normal periods.

Such a regulation of a student's movement in no way denies that person any constitutionally guaranteed right. On the morning in question all students were given an opportunity to perform their usual classroom schedule for an extra 1 and ½ periods. Except for the five minute interval when the canine unit entered the room, plaintiff and all other students were exposed only to a longer than normal first period class. Such an extended period had been experienced at other times during convocations and school assemblies.

School officials maintain the discretion and authority for scheduling all student activities each school day. Plaintiff will not be heard to say that because she was made to stay in her classroom an extra 1½ hours, she was denied a constitutionally protected freedom from unreasonable seizure. No evidence was presented at trial that shows plaintiff was in any way discomforted by the mere fact of being made to continue her class work for an extra 95 minutes. Although the students were requested to remain in their first period classes, those wishing to use the washroom facilities were accommodated by an escort to the washroom door. Care was taken by the school officials to provide custodians at each exit in case an emergency arose. Although unknown by the students, those uniformed officers in the halls that morning were under orders not to pursue any students outside the building. Although it can be argued that the spectre of a uniformed officer may chill some vague right to movement within the school, such contention fails in light of the fact that student movement is constantly restricted for other legitimate educational purposes. Moreover, uniformed police officers are, unfortunately, not an uncommon sight in today's public schools. Therefore, this Court finds no seizure of the

plaintiff or other students within the Senior and Junior High School prior to any alert by the trained dogs.

Turning next to the search aspect of the Fourth Amendment, the issue becomes whether the activity of the defendants on the morning in question prior to any alert by the trained dogs was a search and, if so, whether the search, although warrantless, was reasonable. This Court finds for the reasons stated below that entry by the school officials into each classroom for five minutes was not a search contemplated by the Fourth Amendment but, rather, was a justified action taken in accordance with the *in loco parentis* doctrine. Furthermore, the presence of the uniformed police officer in the room, at the request of the school official and with the agreement that no arrests would occur as a result of finding any drugs upon students, did not alter the basic function of the school official's activities. Moreover, the presence of the dog and its trainer within the classroom, also at the request and supervision of the school officials, was only an aide to that official's observation of students. Finally, for purposes of this section, the sniffing of a trained narcotic detecting canine is not a search. Since no search was performed up until the time the dogs alerted, no warrant was necessary for the initial observation by the school officials.

There is no question as to the right and, indeed, the duty of school officials to maintain an educationally sound environment within the school.[10] It is the responsibility of the school corporation personnel to supervise students while they attend classes.[11] It is also the responsibility of the school administrator to insure the proper functioning of the educational process. *M. v. Bd. of Ed. Ball-Chatham C.U.S.D. No. 5,* 429 F.Supp. 288 (S.D.Ill.1977). Maintaining an educationally productive atmosphere within the school rests upon the school administrator certain heavy responsibilities. One of these is that of providing

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[10] Ind.Code, § 20-8.1-5-2.

[11] Ind.Code, § 20-8.1-5-1.

an environment free from activities harmful to the educational function and to the individual students. Drug use within the school became an activity the school administrator wished to eliminate. It cannot be denied that each of the school administrators possessed the authority to enter a classroom on the day in question in order to prevent the use of illicit drugs. *People v. Overton,* 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967); *M. v. Bd., supra; Bellnier v. Lund,* 438 F.Supp. 47 (N.D.N.Y.1977). Acting alone, each school administrator could have unquestionably surveyed a classroom to prevent drug use. Because those administrators now acted with assistance from a uniformed officer does not change their function. The officers were merely aiding in the inspection, at the request of the school administrators. Their presence does not change the actions of the school official from that of supervision *in loco parentis* to that of an unwarranted search. Although they were obviously clothed with their state authority, they had previously agreed that no arrests would be made as a result of any drugs found that morning. No police investigations took place on that day nor have any arrests or prosecutions been initiated as a result of the March 23, 1979 inspection.

B. *The Dogs Within The Classroom*

Nor does this court believe the presence of the dog unit within the classroom changes the nature of the observation. Again, the trainer and dog were in the rooms at the request and with the permission of the school administrators. The dog acted merely as an aide to the school administrator in detecting the scent of marijuana. The dog handler interpreted the actions of the dog for the benefit of the school administrator. Bringing these nonschool personnel into the classroom to aid the school administrators in their observation for drug abuse is, of itself, not a search. Students are exposed to various intrusions into their classroom environment. The presence of the canine team

for several minutes was a minimal intrusion at best and not so serious as to invoke the protections of the Fourth Amendment.

Plaintiff, however, contends that the walking up the aisles and the sniffing of the dog constituted a search within the meaning of the Fourth Amendment and, as such, it was not based upon probable cause and was therefore in violation of her constitutionally protected rights. Plaintiff's assertion misreads the present state of the law concerning the use of drug detecting canines.

The use of the dogs in this case occurred in the public school environment, an area where courts have not granted full application of the Fourth Amendment's protections. *Moore v. Student Affairs Committee of Troy State Univ.,* 284 F.Supp. 725 (M.D.Ala.1968); *M. v. Bd. Ball-Chatham C.U.S.D. No. 5,* 429 F.Supp. 288 (S.D.Ill.1977); *Bellnier v. Lund,* 438 F.Supp. 47 (N.D.N.Y.1977). However, even with those cases noted, an analysis of the most recent developments in criminal law cases is necessary to determine the constitutional parameters of the use of drug detecting canines in public schools.

Although the subject of using drug detecting canines has not been specifically addressed in this circuit, it has been analyzed in other courts. In *United States v. Fulero,* 162 U.S.App.D.C. 206, 498 F.2d 748 (1974), a marijuana-sniffing dog was allowed to sniff the air around a footlocker in a bus depot. The defendant alleged such sniffing constituted an unpermissible action in violation of his Fourth Amendment rights. The Circuit Court for the District of Columbia responded that defendant's contention was "frivolous" and that the actions of the police were responsible and not in violation of any constitutionally protected rights. The Second Circuit Court of Appeals held in *United States v. Bronstein,* 521 F.2d 459 (2d Cir. 1975), *cert. den.,* 424 U.S. 918, 96 S.Ct. 1121, 47 L.Ed.2d 324 (1976), that the sniffing of a canine at a baggage terminal did not constitute a search. One year later, the Ninth Circuit Court of Appeals also held that the use of marijuana-sniffing

dogs to sniff the air around a parked semi-trailer was reasonable and therefore not a prohibited search under the Fourth Amendment. *United States v. Solis,* 536 F.2d 880 (9th Cir. 1976). In *Solis,* the Court of Appeals reversed the district court's holding that use of the dog was a search without probable cause and therefore illegal. The latest circuit to find that the dog's actions of sniffing the air outside a defendant's locker was not a search was in *United States v. Venema,* 563 F.2d 1003, (10th Cir. 1977). See also, *United States v. Race,* 529 F.2d 12 (1st Cir. 1976).

A common thread that runs through all four of the above cited circuit cases was the fact that the law enforcement officers had previous independent information or "tips" concerning the whereabouts of the drugs that were later sniffed out by the dogs. See *Fulero, supra,* 162 U.S.App.D.C. at 206, 498 F.2d at 748; *Bronstein, supra,* at 460; *Solis, supra,* at 881; *Venema, supra,* at 1004, 1005.

Turning to this case, the evidence shows the school administrators had compiled an extensive list of previous incidents of drug use within the school. In twenty school days before the investigation, thirteen incidents were reported where students were found either to be in possession of drugs or drug paraphernalia or under the influence of drugs or alcohol. The atmosphere within the Highland Junior and Senior High Schools was one of frustration on the part of school administrators and faculty brought about by their inability to control or arrest the drug use problem. Additionally, there was evidence from some students of refusal to speak out against those students using drugs for fear of reprisals. The use of the canine units was decided upon only after the upsurge in drug use at the schools. The school officials, therefore, had outside independent evidence indicating drug abuse within the school. Use of the dogs to detect where those drugs were located was not unreasonable under the circumstances. Nor does the fact that the officials had no information about specific students and drug

possession invalidate the use of the dogs. This Court now finds that in a public school setting, school officials clothed with the responsibilities of caring for the health and welfare of the entire student population, may rely on such general information to justify the use of the canines to detect narcotics. What level of information is necessary must be determined on a case by case basis, however, this Court holds the lesser standard of a "reasonable cause to believe" applicable in such a determination. See *M. v. Bd., supra.* School officials fulfilling their state empowered duties will not be held to the same standards as law enforcement officials when determining if the use of canines is necessary to detect drugs within the schools. This lesser standard applies only when the purpose of the dog's use is to fulfill the school's duty to provide a safe, ordered and healthy educational environment.

Also considered as a factor in the above cited dog-sniffing cases was the absence of any normal or justifiable expectation of privacy with respect to the objects searched.[12] See *Bronstein, supra,* at 464 (Mansfield, J. concurring). Although each of those cases dealt with the search of objects rather than of persons, as in this case, the same test of reasonableness applies. As the Supreme Court of the United States stated in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Fourth Amendment protections are the protections of people not places. The *Katz* Court held that police action which intrudes upon and invades an individual's justifiable expectation of privacy constitutes a search within the meaning of the Fourth Amendment. This Court first distinguishes *Katz* from this case on the basis that this is not a police action and second, that the students did not have a justifiable expectation of privacy that would preclude a school administrator from sniffing the air around the desks with the aid of a trained drug

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[12] *United States v. Fulero* (footlocker); *United States v. Bronstein* (suitcase); *United States v. Solis* (semi-trailer); *United States v. Venema* (rented locker).

detecting canine. The use of the dog in this operation was an aid to the school administrator and as such its use is not considered a search. *Solis, supra.* Moreover, plaintiff as well as other students in a public school, does not fall within the meaning of *Katz* because of the very nature of public school education. Any expectation of privacy necessarily diminishes in light of a student's constant supervision while in school. Because of the constant interaction among students, faculty and school administrators, a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting.

This is not to indicate that one attending public schools sheds his or her constitutional rights upon entering the school house doors; such is obviously not the case. *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment protection when wearing black armbands as a form of student expression); *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (Procedural due process guaranteed in suspension and expulsion hearings). However, in matters concerning the reasonable exercise of supervision and authority by school officials, this Court recognizes that a certain balancing occurs between an individual student's rights and the school administrator's need to protect all students and the educational process. *Bellnier v. Lund,* 438 F.Supp. 47 (N.D.N.Y.1977). A reasonable right to inspection is necessary to the school's performance of its duty to provide an educational environment. *Moore v. Student Affairs Committee of Troy State Univ.,* 284 F.Supp. 725 (M.D.Ala.1968).

The health and safety of all students at the two schools was threatened by an increase in drug use. The schools' administrators delegated by the state with the duty and responsibility to maintain order, discipline, safety and education within the school system supervised the investigation which was designed with the single purpose of eliminating drug use inside the school buildings. The operation was carried out in an unintrusive manner in each classroom.

Moreover, the procedure of bringing the trained dogs into each classroom was planned so as to cause only a few minutes interruption. All students were treated similarly up until an alert by one of the dogs. No student was treated with any malice nor was the operation planned in a way so as to embarrass any particular student. Weighing the minimal intrusion against the school's need to rid itself of the drug problem, the actions of the school officials leading up to an alert by one of the dogs was reasonable and not a search for purposes of the Fourth Amendment. Up until the trained dogs indicated the presence of marijuana, no violation of any basic Fourth Amendment rights occurred.

C. *The Pocket Search*

When a dog alerted to the plaintiff, she was ordered by a police officer to empty her pockets onto the desk under the supervision of a school administrator. She contends that this violated her constitutional right to be secure against unreasonable search and seizure.

The Fourth Amendment recognizes that for each individual there is a sphere of privacy which that individual can justifiedly expect government officials not to invade. In other words, an invasion of that sphere of privacy is a search under the terms of the Fourth Amendment. And, generally, the Fourth Amendment makes two demands of a government official wishing to carry out a search. First, the government official must have probable cause to believe that the law has been or is being violated. Second, the government official must obtain a warrant before carrying out the search.

But these specific requirements can be modified by special circumstances. A city's interest in enforcing a housing code modifies the probable cause requirement. *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The federal government's

interest in enforcing safety and health regulations modifies the probable cause requirement. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Exigent circumstances can excuse the warrant requirement. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Border searches are subject to a modified probable cause requirement and are excepted from the warrant requirement. *U.S. v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977). And searches to prevent skyjacking are subject to a modified probable cause requirement and are excepted from the warrant requirement. *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

While a school student does not shed at the schoolhouse door rights guaranteed by either the Fourth Amendment or any other constitutional provision (*Tinker v. Des Moines School District, supra)*, the student's Fourth Amendment and other constitutional rights are modified by that limited *in loco parentis* relationship which the school officials have with the students. That limited *in loco parentis* relationship modifies the student's Fourth Amendment guarantee of a sphere of privacy which the student can justifiedly expect state officials not to invade. While there is a core of privacy so vital to the student's personhood that it must be respected by a school official standing *in loco parentis*, that sphere of privacy protected by the Fourth Amendment can usually be invaded by a school official standing *in loco parentis* without a warrant, and (rather than upon probable cause) upon reasonable cause to believe that the student has violated or is violating school policy. *Moore v. Student Affairs Committee of Troy State University, supra; M. v. Board of Education Ball-Chatham Comm. Unit School Dist. No. 5, supra.* In other words while "the *in loco parentis* authority of a school official cannot transcend constitutional rights . . ., the student-teacher relationship out of which [*in loco parentis*] authority readily flows does have an impact on the application of constitutional doctrine to the rights of students." *Picha v. Weilgos*, 410 F.Supp. 1214, 1218-19 (N.D.Ill.1976). "The

student's right to be free from unreasonable search and seizure must be balanced with the necessity for the school officials to be able to maintain order and discipline in their schools and to fulfill their duties under the *in loco parentis* doctrine to protect the health and welfare of their students." *M. v. Board of Education Ball-Chatham Comm. Unit School Dist No. 5, supra,* 429 F.Supp. at 292.[13]

In conducting the pocket search, as well as the other searches in question, the school officials clearly were not concerned with the discovery of evidence to be used in criminal prosecutions, but rather were concerned solely with the elimination of drug trafficking within the schools. It cannot be disputed that the school's interest in maintaining the safety, health and

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[13] This Court notes the state of the law is unclear as to whether the Fourth Amendment and its coordinate remedy, the Exclusionary Rule, apply in full force to searches of students. The competing theories seem to be the following: 1) that the Fourth Amendment applies full force, requiring a finding of probable cause before an impartial magistrate before the search could be declared reasonable. *State v. Mora,* 307 So.2d 317 (La.1975); Buss, *The Fourth Amendment and Searches of Students in Public Schools,* 59 Iowa L.Rev. 739 (1974); 2) the Fourth Amendment does not apply because of the doctrine *in loco parentis* which clothed the school officials with immunity as a "private citizen." *Commonwealth v. Dingfelt,* 227 Pa.Super. 380, 323 A.2d 145 (1974); *Mercer v. State,* 450 S.W.2d 715 (Tex.Civ.App.1970); *In re Donaldson,* 269 Cal.App.2d 509, 75 Cal. Rptr. 220 (1969); *People v. Stewart,* 63 Misc.2d 601 313 N.Y.S.2d 253 (Crim.Ct., N.Y.Co.1970); 3) the Fourth Amendment, although applicable, is emasculated by the inapplicability of the Exclusionary Rule. *United States v. Coles,* 302 F.Supp. 99 (D.Me.N.D.1969); and 4) the Fourth Amendment is applicable but the standard of determining whether the search was reasonable will be lowered to something other than probable cause. *People v. Scott D.,* 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974); *State v. McKinnon,* 88 Wash.2d 75, 558 P.2d 781 (1977); *People v. Jackson,* 65 Misc.2d 909, 319 N.Y.S.2d 731 (App.Term, 1st Dept.1971), *aff'd,* 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (1972).

education of its students justified its grappling with the grave, even lethal, threat of drug abuse. The pocket search was conducted in furtherance of the school's legitimate interest in eliminating drug trafficking within the school.

It should be noted at this point that had the role of the police been different, this court's reasoning and conclusion may well have been different. If the search had been conducted for the purpose of discovering evidence to be used in a criminal prosecution, the school may well have had to satisfy a standard of probable cause rather than reasonable cause to believe. *Picha v. Wielgos, supra.* Furthermore, this court is not here ruling whether any evidence obtained in the search could have been used in a criminal prosecution. This court is ruling that so long as a school is pursuing those legitimate interests which are the source of its *in loco parentis* status, "maintaining the order, discipline, safety, supervision, and education of the students within the school" (*Picha v. Wielgos, supra,* 410 F.Supp. at 1221), it is the general rule that the Fourth Amendment allows a warrantless intrusion into the student's sphere of privacy, if and only if the school has reasonable cause to believe that the student has violated or is violating school policies.

The pocket search was an invasion of the sphere of privacy which the Fourth Amendment protects; it was a search. But the alert of the dog constituted reasonable cause to believe that the plaintiff was concealing narcotics. Having that requisite reasonable cause to believe that the plaintiff was concealing narcotics, the defendants did not violate the plaintiff's Fourth Amendment rights by ordering her to empty her pockets onto the desk. By conducting the pocket search, the school officials did not violate the plaintiff's right to be secure against *unreasonable* search and seizure.

D. *The Nude Search*

Plaintiff further alleges that being subjected to the nude search that morning violated her right against unreasonable search and seizure. It was only upon a continued alert of the trained canine that the school officials based their decision to search the plaintiff. This Court must focus upon the reasonableness of the search to determine its constitutionality. Upon doing so, this Court holds that conducting a nude search of a student solely upon the continued alert of a trained drug-detecting canine is unreasonable even under the lesser "reasonable cause to believe" standard.

Subjecting a student to a nude search is more than just the mild inconvenience of a pocket search, rather, it is an intrusion into an individual's basic justifiable expectation of privacy. Before such a search can be performed, the school administrators must articulate some facts that provide a reasonable cause to believe the student possesses the contraband sought. The continued alert by the trained canine alone is insufficient to justify such a search because the animal reacts only to the scent or odor of the marijuana plant, not the substance itself. There is always the possibility that one's clothing may have been inadvertently exposed to the pungent odor of the drug. Although a trained dog is certainly more discriminative than electronic detection devices, *United States v. Bronstein, supra,* at 462, 463, it only alerts to the odor of the substance, not the substance itself. Therefore, the alert of the dog alone does not provide the necessary reasonable cause to believe the student actually *possesses* the drug.

Factors considered important when determining the reasonableness of a student search are: (1) the student's age; (2) the student's history and record in school; (3) the seriousness and prevalence of the problem to which the search is directed; and (4) the exigency requiring an immediate warrantless search. *Bellnier v. Lund,* 438 F.Supp. 47 (N.D.N.Y.1977); *People v. Scott D., supra,* fn. 11.

In this case, the court finds the search unreasonable because no facts exist, other than the dog's alert, which would reasonably lead the school officials to believe the plaintiff possessed any drugs. Therefore, the nude search of plaintiff was unlawful because it did violate her Fourth Amendment right against an unreasonable search and seizure.

E. *Conclusion*

It has long been established that law enforcement personnel can and must use the basic human senses in the detection of crime. These human senses may generally be aided by such non-living artificial devices as binoculars, flashlights, magnetometers, breathalyzers, camera lenses and ordinary prescription glasses. Four decades ago, Professor Wigmore cited the rule that most courts held admissible evidence that tracing by a trained dog led to the accused. 1 Wigmore, Evidence, Section 177(2) (3d Ed.1940).

Dogs have long been used in police work. They often accompany police officers on night patrol in detection through sound and scent of would-be criminals lurking in the dark or moving in stealth. It is well known that a patrol dog is endowed by nature with qualities of hearing and smell that appear to be superior to those of humans. See *U.S. v. Thomas,* 1 M.J. at 401 (C.M.A.1976).

It is generally known that marijuana radiates a distinctive odor which can be detected by humans acquainted with it, and by trained dogs. *U. S. v. Guerra,* 554 F.2d 987 (9th Cir. 1977); *U. S. v. Bronstein,* 521 F.2d 459 (2d Cir. 1975), *cert. den.,* 424 U.S. 918, 96 S.Ct. 1121, 47 L.Ed.2d 324; *U. S. v. Pond,* 523 F.2d 210 (2d Cir. 1975), *cert. den.,* 423 U.S. 1058, 96 S.Ct. 794, 46 L.Ed.2d 649 (1976); *U. S. v. Martinez-Miramontes,* 494 F.2d 808 (9th Cir. 1974), *cert. den.,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974); *U. S. v. Falley,* 489 F.2d 33 (2d Cir. 1973); *U. S. v. Lewis,* 392 F.2d 377 (2d Cir. 1968), *cert. den.,*

393 U.S. 891, 89 S.Ct. 212, 21 L.Ed.2d 170 (1968); and *People v. Campbell,* 67 Ill.2d 308, 10 Ill.Dec. 340, 367 N.E.2d 949 (1977).

People trafficking in illegal narcotics often attempt to conceal the odor. See *U. S. v. Fulero,* 162 U.S.App.D.C. 206, 498 F.2d 748 (1974). The existence of such odors often provides useful information to investigative law enforcement officers concerning the location and proximity of illegal controlled substances. The Supreme Court of the United States has long recognized that such odors can be convincing evidence of probable cause. See *Johnson v. U. S.,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1947). (It should be noted this case went off on the warrant requirement and not the existence of probable cause.)

The Supreme Court of the United States has yet to rule explicitly on whether the use of narcotic detection dogs in the context of the Fourth Amendment establishes probable cause. One case may point the direction. In *U. S. v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), a marijuana detection dog signaled the presence of a controlled substance (marijuana) inside a footlocker. The First Circuit had held that such provided probable cause to believe that the footlocker contained a controlled substance. Here, as in *Johnson,* the court went off on the warrant requirement of the Fourth Amendment. It was the unauthorized and nonconsensual opening of the locker and the inspection of its interior that constituted the unlawful search, not the use of the dog. The dog's conduct constituted evidence that caused the court to observe that "Even on the record the issuance of a warrant by a judicial officer was reasonably predictable.", 97 S.Ct. 2486. Obviously, under the reasoning of *Johnson* and *Chadwick* a description of a dog's conduct, training and experience by a knowledgeable person who can interpret the conduct of the dog as signaling the presence of a controlled substance would constitute the minimal requirement for finding probable cause.

It is also apparent that the use of properly trained dogs in public areas accessible to them is a useful aid to law enforcement officials in determining the existence of probable cause to believe that contraband exists within a certain locale. In *U.S. v. Solis,* the 9th Circuit at 536 F.2d 882 stated:

> "Dogs because of their keen olfactory sense, have long been used to assist police in search and rescue missions .... Detection of contraband is a similar and related task. The recent proliferation of crimes involving transportation of drugs and explosives has led naturally to the training of dogs ... to detect the presence of such contraband."

Neither does the reasoning or result in *Katz v. U. S.,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1976), constitute a per se limitation on the proper use of properly trained dogs in the limited and legitimate area of police investigation. Neither does the same constitute a *per se* violation of the Fourth Amendment. In a proper case, the conduct of a properly trained dog standing alone can provide the necessary basis for probable cause. To be sure such conduct of a dog must be interpreted by a knowledgeable person. See the careful analysis in *U. S. v. Grosskreutz,* 5 M.J. 344 (C.M.A.1978).

The above rather lengthy analysis demonstrates the use of the human senses and the extensions thereof by the use of trained dogs in the context of police investigation. There is a heavy if not total carryover of the ideas expressed to administration of the public schools.

The General School Powers Act of the State of Indiana, I.C. 20-5-1-1 is a broad grant of authority to those legally responsible for the administration of the public schools and has been so interpreted by the Courts of Indiana. *Salem Community School Corp. v. Easterly,* 150 Ind.App. 11, 275 N.E.2d 317 (1971), and *Gary Teachers Union No. 4 v. Gary,* 152 Ind.App. 591, 284 N.E.2d 108 (1972). See also, *Bouse v. Hipes,* 319 F.Supp. 515 (S.D.Ind.1970).

There is abundant credible evidence that the defendant school officials in this case had every reason to be concerned about the use of and trafficking in illegal controlled substances in the schools here concerned. It is equally apparent that in the fulfillment of their statutorily imposed duties these school officials could and should use their human senses to detect conditions that were violative of the good order of the school. In doing so, such school officials are not acting as police officers but are simply meeting their obligations as school officials.

These school officials can secure proper aids to supplement and assist basic human senses. In doing so, it should be emphasized that the defendants proceed as *school officials* and not, per se, as policemen. In this case, acting as school officials, the defendants proceeded with a careful and sensitive plan that was formulated with much concern for basic educational values. In the execution of this plan, the school officials sought the aid of other trained persons who had relevant talents from various community resources. Various police departments were one such resource. Ms. Little with her vast experience in the training of dogs was another resource. Ms. Little was engaged in a perfectly legitimate, if unprofitable, enterprise of training these type dogs. There is nothing sinister about her enterprise. As this Court saw and heard her in the court room, there is absolutely nothing sinister about her.

The school officials made every reasonable effort to carry off this plan in a manner compatible with proper order in the schools and with the values therein involved. The proper administration of the public schools necessarily involves the requirement that students be in certain places at certain times. So it was with this plan. Necessary flexibility was built into it in regard to washroom and other human needs. Respect for individual dignity of the student was carefully maintained. A light relaxed atmosphere was created. The effect was anything but a gestapo-like effort run by gestapo-type people. To suggest anything approaching that idea is to do an extreme

disservice to a group of dedicated people who carry heavy legal and moral obligations for public education.

This Court finds no constitutional fault with the basic plan and program as executed. It finds no fault with the school administrators using their own senses and the senses of properly trained outside personnel and dogs to detect serious conditions that are patently adverse to the proper administration of a public school. No fault is found with requiring students to remain in their seats without notice and with their hands on their desks for short periods of time. No fault is found with requiring a student to empty clothing pockets and/or purses upon the alert of a properly trained dog conducted by a properly trained person.

However, when the dog has alerted as to a particular student in the above context and that student is removed from the basic routine as above described and taken to another area of the school for a more thorough examination of the student's body and clothing, another set of constitutional values comes into play. In such a case, there must be adherence to the protections required by the Fourth Amendment. Of course, this requirement while basic and fundamental depends on the test of reasonableness. This Court cannot say as a matter of law that the alerting of a trained dog standing alone is sufficient to establish reasonable cause to believe a complete body search by *school* officials in surroundings that insure and maintain human dignity. This Court can conceive of many situations where the alert of a trained dog alone can provide the necessary reasonable cause for a more complete but private body search.

It is this Court's finding that no such Fourth Amendment probable cause can be found in this record as to the body search of the only individual plaintiff remaining in this case. To be sure, the question may be close when the situation is frozen as of the time the search took place. However, this Court has serious reservations as to whether there were sufficient facts to justify a full body search of this plaintiff at the time it was conducted.

IV. *Defendants Pendergast and Little*

This Court now grants summary judgment in favor of both defendant Al Pendergast, Chief of Highland Police Department, and Patricia Little.

Pendergast did not participate in the illegal search of plaintiff Doe, nor does any evidence show he conducted the search. No liability can be found for any of the actions of this defendant. *Adams* v. *Pate,* 445 F.2d 105 (7th Cir. 1971).

Patricia Little, likewise, did not participate in the illegal search, moreover, she in no way indicated to the school officials that such illegal searches were necessary at the Highland Schools. This Court does not, therefore, find the actions of Little during the morning in question to have violated any of plaintiff's constitutional rights. See *Baker* v. *McCollan,* ____ U.S. ____, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

V. *Relief*

The plaintiff has prayed for two forms of relief in the present action and has reserved on the prayer for damages. This Court now rules on all three forms of relief, declaratory judgment, injunction, and damages. Because of the Court's findings on the immunity of the defendant school officials, the issue of damages can be determined at this time.

A. *Damages*

It is settled case law that school officials possess a qualified immunity with respect to acts performed within the course of their duties. *Wood* v. *Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), *reh. den.,* 421 U.S. 921, 95 S.Ct. 1589, 43 L.Ed.2d 790 (1975); Note, *School and School Officials,* 78 W.Va.L.Rev. 259 (1975). That immunity exists if the official acts in good faith and not in ignorance or disregard of settled indisputable principles of law. *Wood* v. *Strickland, supra,* 420 U.S. at 321, 95 S.Ct. 992. In the *Wood* case the court stated:

> "We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." *Wood* v. *Strickland, supra,* at 321, 95 S.Ct. at 1000.

The defendant school administrators acted in good faith and with a regard for the welfare and health of the plaintiff. Her search was conducted in an atmosphere designed to reduce to a minimum any apprehension or embarrassment. Moreover, the law in the area of student searches in public schools is obviously unsettled as suggested by the diversity of the theories and results in the cases cited here. This Court will not charge school officials with "predicting the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 188 (1966). Therefore, this Court finds that the defendant school officials are immune from liability arising out of the search and are entitled to summary judgment on the issue of monetary damages.

B. *Declaratory Relief*

Plaintiff is entitled to declaratory relief only upon the Court's finding that the nude body search made without a finding of any reasonable cause to believe is in violation of her Fourth Amendment rights. In all other aspects, plaintiff's prayer for declaratory relief if now DENIED. See, 28 U.S.C. § 2251.

C. *Injunctive Relief*

This Court now DENIES plaintiff's motion for a permanent injunction as to all issues raised. Because this Court has ruled that the nude body search of plaintiff was in violation of the Fourth Amendment and thus unlawful, the request now

becomes similar to a prayer for injunctive relief against a criminal act and therefore unnecessary. *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Moreover, granting plaintiff's prayer for injunctive relief as to the other aspects of the inspection complained of would be inconsistent with this Court's findings.

VI. *Class*

This Court now denies plaintiff's request for certification of a class pursuant to 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

There is a basic burden on the plaintiff to show entitlement to a class certification under Rule 23. It takes more than mere verbiage in a complaint to meet that burden. There is also a basic burden to demonstrate that the plaintiff will be an adequate representative of the other members of a class. See *East Texas Motor Freight System v. Rodriquez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). See also, *Shelton v. Pargo, Inc.,* 582 F.2d 1298 (4th Cir. 1978); *Doninger v. Pacific Northwest Bell, Inc.,* 564 F.2d 1304 (9th Cir. 1977); *Shipp v. Memphis Area Office Tenn. Dept. of Emp. Security,* 581 F.2d 1167 (6th Cir. 1978); and *Miller v. Motorola, Inc.,* 76 F.R.D. 516 (N.D. Ill.1977).

The record here clearly discloses several fatal failures of the plaintiff to meet the elementary requirements of Rule 23. Those members of the proposed class are not so numerous so as to make joinder of them as parties impracticable. Fifty students were alerted to by the drug detecting canines on the morning in question. Of those fifty, eleven were subject to a more extensive search of the body. Of those eleven, only three other students were subject to the unlawful nude search. It is also very clear from the record that some students in this high school are not in sympathy with the claims and contentions of this plaintiff. This Court finds that joinder would have been permissible and that in light of counsel's motion to dismiss party plaintiffs it now DENIES plaintiff's motion for class certification.

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2116

DIANE DOE, etc., et al.,

Plaintiffs-Appellants,

v.

OMER RENFROW, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H 79-233—**Allen Sharp**, *Judge.*

ARGUED APRIL 3, 1980—DECIDED JULY 18, 1980*

Before CUMMINGS, SPRECHER and BAUER, *Circuit Judges.*

PER CURIAM. In May 1979, plaintiff Diane Doe, a student at Highland Junior High School in Highland, Indiana, and four other students[1] filed a civil rights complaint under 28 U.S.C. §§ 1343(3) and 1343(4). The

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* This appeal originally was decided by unreported order on July 18, 1980. See Circuit Rule 35. The panel has decided to issue the decision as an opinion.

[1] The four other plaintiff students were dismissed without prejudice to become members of the proposed plaintiff class (but with prejudice with respect to damages) by the district judge on motion of plaintiff's counsel on June 7, 1979.

defendants were Omer Renfrow, Superintendent of the Highland, Indiana, Town School District; George Kurteff, Principal of the Highland Junior High School; five members of the Highland Town School District Court; Al Prendergast, Highland Police Chief; and Patricia Little, a trainer of drug-detecting canines.[2] Plaintiff requested a class certification of other students at Highland High School and Highland Junior High School. The gravamen of the complaint was that plaintiff and others were illegally sniffed by police dogs during school hours and pocket-searched if a dog alerted to them in order to determine whether they possessed controlled substances and contraband. As part of the drug investigation, plaintiff alleged that she and three other students "were compelled to remove their clothing and submit to visual inspection by defendants' agents" (Par. 17 of complaint).

The complaint also charged that 2,780 students at Highland High School were subject to the canine sniffing and that 17 of them thereafter "were summarily suspended, expelled, or compelled to withdraw from attendance at school" (Par. 16). According to plaintiff, defendants' practice was "unsupported by particularized facts, reasonable suspicion or probable cause to believe that any of the persons" subject to the canine drug investigation would possess controlled substances (Par. 28). Alleging that defendants' acts violated the Fourth and Fourteenth Amendments in particular, Diane Doe sought $50,000 in actual damages and an equal amount in punitive damages, as well as declaratory and injunctive relief.

A hearing was held on June 7, 1979, with respect to various motions of the parties. On August 30, 1979, Judge Sharp dismissed the action on the merits as to the Highland police chief and dog trainer Patricia Little because they did not participate in the strip search. He granted defendant school officials summary judgment on the issue of monetary damages for the body search of

[2] Fourteen other named defendants were dismissed without prejudice by the district court on June 7, 1979. Several hundred parents or patrons of the Highland School District were simultaneously permitted to intervene as party-defendants.

Diane Doe.[3] However, he held that she was entitled to declaratory relief upon the court's finding that the nude body search was made without a finding of reasonable cause and in violation of her Fourth Amendment rights. The judgment denied all other aspects of her prayer for declaratory relief, denied her motion for a permanent injunction and denied class certification. The judgment was supported by a lengthy, thoughtful opinion reported in 475 F.Supp. 1012.[4]

Defendants have not appealed from the trial court's ruling that the nude search of Diane Doe was without reasonable cause to believe she possessed contraband. Because this ruling was not appealed, we will not consider the argument contained in Part V of the brief of *amicus curiae* Indiana School Boards Association.

For the reasons given in Judge Sharp's scholarly opinion, which we adopt as our own, the judgment is affirmed except with respect to the portion of the decision that the defendant school officials are immune from liability arising out of the nude search because they had a "good faith" defense as articulated in *Wood v. Strickland*, 420 U.S. 308. The *Wood* case found that school officials who act "in good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances" and "not in ignorance or dis-

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[3] The only defendants who decided upon the nude search of Diane Doe were school officials who possess a qualified immunity. They were held not liable for damages because no malice was shown and their subjective and objective good faith was not challenged by the complaint nor was the law in the area supposedly settled in plaintiff's favor. *Wood v. Strickland*, 420 U.S. 308, 321-322; *Pierson v. Ray*, 386 U.S. 547, 557.

[4] The result reached by the district court is seemingly condoned in an unnamed student's article entitled "The Constitutionality of Canine Searches in the Classroom," 71 *The Journal of Criminal Law & Criminology* 39 (1980), although the author disagrees with some of the reasoning in the opinion.

See also *United States v. Klein*, ... F.2d ..... (7th Cir. No. 79-2484, decided June 16, 1980), Part II of slip op. dealing with canine sniffing of luggage.

regard of settled indisputable principles of law" are immune from liability. The district court in the instant case added that it "will not charge school officials with 'predicting the future course of constitutional law.'" 475 F.Supp. at 1028. No one can quarrel with these propositions but we do take exception to the application of these sterling principles to the facts of this case.

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law" (420 U.S. at 321).

Wood v. Strickland, supra, accords immunity to school officials who act in good faith *and within the bounds of reason.* We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles. It is not enough for us to declare that the little girl involved was indeed deprived of her constitutional and basic human rights. We must also permit her to seek damages from those who caused this humiliation and did indeed act as though students "shed at the schoolhouse door rights guaranteed by * * * any * * * constitutional provision" (475 F.Supp. at 1023).

We return the matter to the trial court for a determination of damages stemming from the body search. The decision is otherwise affirmed, costs to be borne equally by the respective parties.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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No. 79-2116

DIANE DOE, etc., et al.,

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Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H 79-233—**Allen Sharp**, *Judge.*

NOVEMBER 3, 1980

Before CUMMINGS, SPRECHER, and BAUER, *Circuit Judges.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant Diane Doe, a vote of the active members of the Court was requested, and a majority of the active members of the Court did not vote to grant a rehearing *en banc.** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Chief Judge Fairchild and Circuit Judges Swygert, Wood and Cudahy voted to grant a rehearing *en banc*. Their dissents are appended to this order.

SWYGERT, *Circuit Judge*, dissenting from the order denying the petition for rehearing.

I am deeply troubled by this court's holding that the dragnet inspection of the entire student body of the Highland Senior and Junior High Schools by trained police dogs and their dog-handlers did not constitute a search under the Fourth Amendment. No doctrine of *in loco parentis* or diminished constitutional rights for children in a public school setting excuses this alarming invasion by police and school authorities of the constitutional rights of thousands of innocent children. Any attempt by the district court or this court to portray the events of March 23, 1979 as only a deviation in degree from the normal school day is grossly misplaced. In my view, those events were a deviation in kind and constituted a danger not only to the psychological well-being of the children but to the fundamental concepts of our Bill of Rights.

Although a number of incidents involving alcohol, drugs, and related paraphernalia had been reported to school authorities, no more than twenty-one out of 2,780 students had been involved. School authorities had to concede that, in general, conditions at the Highland schools were at least average and could well have been better than at most other schools. At the time of the raid, they possessed no specific information as to particular drugs or contraband, transactions or events, or drug suppliers or abusers. Nevertheless, over a period of weeks a scheme was developed and executed that implicated all 2,780 students and subjected all to a humiliating search by police dogs.

The raids began at 8:45 A.M. on March 23, 1979. The searchers were divided into teams consisting of at least one dog, one dog handler, one school administrator or teacher, and one or two uniformed police officers. Fourteen dogs were on hand. For the duration of the raid, all schoolhouse doors were either locked or tightly guarded by police and school officials. All students were detained in their first period classrooms; any late arrivers or visitors were led to and detained in a room set aside for

that purpose. No student was allowed to leave his or her classroom, and if any claimed to need to use the lavatory facilities, school or police authorities escorted and watched over them.

Every student was instructed to place his belongings in view and his hands on his desk. Girls placed their purses on the floor between their feet. The teams of searchers moved from room to room, and from desk to desk. Every single student was sniffed, inspected, and examined at least once by a dog and a joint school-police team. The extraordinary atmosphere at the school was supplemented still further when representatives of the press and other news media, invited in by school authorities, entered the schoolhouses and classrooms during the raid and observed the searches while in progress.

The raid lasted about three hours. After the sniffing and examination of 2,780 students, the searchers found fifteen high school students—and *no* junior high students—in possession of illicit materials. School and police authorities removed five high school students—three girls and two boys—from their classrooms and subjected them to personal interrogations and thorough, but not nude, searches. None was found to be in possession of any contraband. Three or four junior high students were similarly treated and cleared. Four junior high students—all girls—were removed from their classes, stripped nude, and interrogated. Not one of them was found to possess any illicit material.

The district judge held in an opinion adopted by a panel of this court that "the presence of the dog and its trainer within the classroom, also at the request and supervision of the school officials, was only an aide to that official's observation of students. . . . [T]he sniffing of a trained narcotic detecting canine is not a search." I strongly disagree. In my view, the circumstances of March 23 can hardly be likened to the observations of a school administrator, sniffing the air about him as he goes about his business. Here there was evidence that the trained dogs ran their noses along pupils' legs, actually touching the bodies of the students.

The cases cited by the district court as holding that sniffing dogs do not constitute a search are totally inapposite because in those cases the dogs were sniffing inanimate and unattended objects rather than people. Here the intrusive probings by the dogs were in no sense mere observation of "'physical characteristics . . . constantly exposed to the public,' . . . [but] constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (citations omitted). *See also United States v. Kenaan*, 496 F.2d 181 (1st Cir. 1974). We need not speculate afar about the psychological trauma suffered by the students during this mass search. The accusing finger of the police may well remain for a lifetime upon these young, impressionable minds.

Had a warrant properly been sought, I am convinced that none could have issued consistent with the Fourth Amendment. The police and school officials neither possessed nor attempted to gain specific information about any particular student. There was also no information as to any particular drug or contraband transaction or event. Thus, all 2,780 students were under suspicion, and there was no known crime.

A search under these conditions is unconstitutional under either a reasonable suspicion or a probable cause standard. *Terry v. Ohio*, 392 U.S. 1 (1968); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Ybarra v. Illinois*, 444 U.S. 85 (1979). I cannot consider this a "school" case because the mass search was planned and executed with extensive police involvement rather than solely by school personnel. But even considered in the context of "school" cases, there was no reasonable suspicion here to justify the mass search. *See M.M. v. Anker*, 477 F. Supp. 837 (E.D.N.Y.), *aff'd*, 607 F.2d 588 (2d Cir. 1979). Nor was the constitutional violation abrogated by the fact that the police did not plan any arrests. The Fourth Amendment protects against unreasonable searches because of "the right of the people to be secure in their persons" whether or not an arrest would necessarily follow.

Violations of a person's "cherished personal security"* whether engaged in by violent antisocial elements of our society or by overzealous, insensitive police must be condemned. Both should be dealt with in accordance with legal consequences that foster deterrence.

FAIRCHILD, *Chief Judge*, dissenting. I voted for rehearing *en banc* and surely join in Judge Swygert's concern whether the dogs were used in a manner which itself without further individual intervention invaded protected privacy rights. I further question whether the record demonstrates that the responses of the dogs were sufficiently reliable indicators of the presence of contraband to constitute probable cause justifying the individual searches. After all, it appears that although the canine response raised suspicion toward 50 students, only 15 were found to possess contraband. As to plaintiff Doe, I gather that she probably caused the dog to respond to her because she had been playing that morning with her own dog which was in heat. I was not, however, a member of the panel, did not read the briefs on appeal, nor hear oral argument with opportunity to question counsel, nor examine the record. I therefore go no further toward expressing at this stage an opinion on the merits of the appeal.

WOOD, *Circuit Judge*, dissenting. As I believe this case raises significant issues with an impact beyond these particular parties, I respectfully dissent. I join generally in the concerns expressed by my other dissenting colleagues. However, without the benefit of an *en banc* hearing, I am reluctant to express an opinion on the merits of those issues.

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* *Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

CUDAHY, *Circuit Judge*, dissenting. Although I do not feel in a position to express specific views on the merits, I share in the concerns so eloquently expressed by my colleagues.

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